BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIAN LUTKE	)	
Claimant	)	
	)	
VS.	)	
	)	
PEARSON EXCAVATING, INC.	)	
Respondent	)	Docket No. 1,022,976
	)	
AND	)	
	)	
BUILDERS ASSOCIATION SELF	)	
INSURERS FUND OF KANSAS	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the June 24, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ found claimant failed to prove by a preponderance of the credible evidence that he gave notice of his work-related accident within the 10 day period set forth in K.S.A. 44-520, or that he suffered an accidental injury arising out of and in the course of employment with respondent on the date(s) alleged.[1] As a result, the ALJ denied claimant's request for authorized medical treatment, payment of medical bills and temporary total disability compensation.

The claimant argues that the ALJ exceeded her jurisdiction by denying his request for benefits. He maintains he met his evidentiary burden of establishing a compensable injury for which he provided timely notice to his direct supervisor. Thus, claimant contends this matter should be found compensable.

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[1] ALJ Order (Jun. 24, 2005) at 1-2.

Respondent contends that at no time did claimant indicate that he suffered a work related injury either by telling his supervisor or by following the respondent's policy of indicating on his weekly time cards that he sustained an injury. Respondent further asserts that claimant did not show any outward signs of injury in January 2005, or request medical treatment for an injury. Respondent therefore argues that the ALJ's decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds the ALJ's preliminary hearing Order should be affirmed.

Claimant was hired in September 2004 as a heavy equipment operator. Claimant indicated that on the day of his alleged accident sometime in January 2005 he was asked to operate a bulldozer. He testified that he was driving this bulldozer over the top of a hill when the front of it dropped, his seatbelt came undone and he flew forward out of his seat smashing his forehead into the rolls bars.[2]

Claimant testified that he went to his immediate supervisor, Bert Tucker, whom he indicated was present at the time and told him what happened. Claimant further testified he had a small cut on his forehead from the air conditioning vent in the bulldozer. At the time he did not ask to be referred to a doctor. Claimant continued to work the rest of January and into March when he first sought medical treatment on March 7th.

Respondent has a policy of requiring its employees to indicate on their weekly time cards whether they had suffered injury while on the job. None of claimant's time sheets from the week ending December 15, 2004 through March 30, 2005 indicate claimant had suffered injury. Claimant indicated that he was aware of respondent's policy and procedure for report injuries, and stated that he did not report his injury because he felt like he was okay so he did not see a reason to at the time.

Bert Tucker denied claimant ever notified him of any injury at any time nor did claimant ever appear with a cut or abrasion on his face.

On April 5th or 6th claimant ended up in the hospital and was treated by Dr. Raymond Grundmeyer. Claimant was examined and had ended up having cervical surgery which included a discectomy and a fusion. Claimant went into off work status immediately following surgery. Three weeks after his surgery on April 26, 2005 claimant went to respondent and filled out forms to request that respondent pay for his medical expenses

[2] P.H. Trans. at 6-7.

and provide medical treatment. This was the first time that claimant asked respondent for information about filing a workers compensation claim.[3]

Patrick McKean, respondent's office manager, testified that the first time he learned of an injury involving the claimant was on April 26, 2005. He recalls that the claimant told him he had been injured three months prior and now wanted to file a workers compensation claim and wanted to know the name of respondent's insurance carrier.[4] Mr. McKean testified that he was not aware that claimant had suffered an injury and had not previously been notified.

The ALJ concluded claimant had failed to satisfy his evidentiary burden on the issues of notice and whether he suffered an accidental injury arising out of and in the course of his employment. The Board has reviewed the record and finds no reason to disturb the ALJ's legal conclusions.

As to both issues, the ultimate resolution turns upon credibility. The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed their testimony over the claimant's testimony. The Board concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify.

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as

[3] *Id.* at 21.

[4] *Id.* at 46.

> provided in this section, or (c) the employee was physically unable to give such notice.

In this instance, claimant testified that he gave Bert Tucker notice of his injury. Mr. Tucker denies this fact. The ALJ concluded that Mr. Tucker was more credible or believable than the claimant. Her Order makes it clear that not only was she persuaded by Mr. Tucker's denial, but also by the fact that claimant's weekly time records do not reflect any reports of accident. Claimant clearly had a weekly opportunity to inform respondent of his accident and he did not do so. The Board agrees with the ALJ's legal conclusion and affirms the ALJ's finding on the issue of notice.

The Board also finds the ALJ's conclusion with respect to the issue of accidental injury arising out of and in the course of employment should be affirmed. An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the worker's accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

Here, the ALJ concluded claimant had failed to meet his evidentiary burden on this issue. Again, she was apparently persuaded by the fact that claimant's weekly time cards did not include any reference to an injury and by Mr. Tucker's denial of any notification. Having failed to prove an essential element of his claim, the ALJ denied the claim. The Board has considered the evidence contained within the record and finds the ALJ's determination on this issue is well founded and should not be disturbed.

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[5] K.S.A. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[7] *Id.*

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 24, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2005.

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director